## AIDI ABDULLAH v. NGOOI KU SIONG & ANOR.

**[O.C.J. (Siti Norma Yaakob J.) August 30, 1983]**
**[Kuala Lumpur – Civil Suit No. P156 of 1982]**

*Damages – Quantum – Facial and neck injuries, compound fractures of radius and ulna – General damages in the sum of $81,500.*

The present claim involved only quantum on both general damages and loss of earnings as the defendants have admitted liability. As a result of the accident on July 30, 1977 the plaintiff suffered the following injuries: (1) facial injuries and fractures and loss of 9 teeth. For the 3 fractures, the plaintiff was wired and mobilised with arch bars between his upper and lower jaws and they were removed before his discharge from hospital on November 5, 1977, (2) neck injuries which include lacerations to the laryngeal region, two fractures to the thyroid cartilage and cricold ring which prevented the plaintiff from speaking or vocalizing for 3 months following the accident, (3) compound fracture of the lower half of the left radius and ulna which required fixation of a pin and plate and which were subsequently removed when the fracture showed union. The plaintiff was hospitalised for 3 months and 5 days and underwent 4 operations. He was under constant medical attention for well over 3 years.

**Held**: the plaintiff should be awarded $81,500 general damages (being $26,000 for facial injuries, $40,000 for neck injuries, $15,000 for the fracture of the radius and ulna, $500 for bruises) $5,810 special damages (being $2,700 for loss of earnings during the 6-month incapacity and agreed $3,110.).

*Cases referred to:*

(1) *Yasin bin Wahab* v. *Loo Kok Wai* [1980] 2 M.L.J. 43.
(2) *Latif Stephen Aloysius* v. *Singapore Bus Service Ltd. & Anor. Dass,* Quantum in Accident Claims Vol. 2 p. 101
(3) *Chong Teen Thong* v. *Yap Chen Len & Anor. Dass,* Quantum in Accident Claims Vol. 2 p. 107.
(4) *Ikiw* v. *Samuels & Ors.* [1963] 1 W.L.R. 991.
(5) *Sum Wun Hoong* v. *Kader Ibramshah s/o Pichay* [1981] 1 M.L.J. 295.
(6) *Moelicker* v. *A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9.

CIVIL SUIT.

*S. Kulasegaran* for the plaintiff.
*Guy Varegheese* for the defendants.

*Cur. Adv. Vult.*

**Siti Norma Yaakob J.**: Only quantum on both general damages and loss of earnings is disputed in this case as the defendants have admitted liability and they have also agreed to a sum of $3,110/- for the other incidentals of special damages claimed.

As a result of the accident which happened on July 30, 1977 the plaintiff suffered (1) facial injuries which include extensive bruises and swelling over right half of his face, 3 fractures and loss of nine teeth. For the 3 fractures, the plaintiff was wired and mobilised with arch bars between his upper and lower jaws and they were removed before his discharge from hospital on November 5, 1977.

(2) neck injuries which include lacerations to the laryngeal region, two fractures to the thyroid cartilage and cricold ring which prevented the plaintiff from speaking or vocalizing for 3 months following the accident. An emergency trachostomy was done to him upon admission and a laryngeal stent was inserted and which was only removed on October 19, 1977. However, the plaintiff's voice has never been quite the same and it is still hoarse and weak and when giving evidence before me, I noticed that at times he was hardly audible.

(3) compound fracture of the lower half of the left radius and ulna which required fixation of a pin and plate and which were subsequently removed when the fracture showed union.

(4) minor bruises on both knees and right chin which have healed.

For the above injuries, the plaintiff was hospitalised for 3 months and 5 days. He underwent 4 operations and has been under constant medical attention for well over 3 years.

Taking the more serious of the facial injuries first, I was referred to the case of *Yasin bin Wahab* v. *Loo Kok Wai*[1], where $7,000/- was awarded for a fracture of the maxilla, $7,500/- for the fracture of the left mandible and $5,000/- for the loss of 5 teeth. Similarly, for the 2 fractures of the maxilla, I award a sum of $14,000/-, $7,500/- for the fracture of the mandible and $9,000/- for the loss of 9 teeth. To this, I would add another sum of $1,000/- for the bruises and swelling suffered on the right half of the plaintiff's face, making a total of $31,500/- for the facial injuries alone. However, as these injuries overlap, I consider a reduction of the total sum awarded is in order and place a figure of $5,500/- as being fair and reasonable under the circumstances thereby reducing the total sum due for the facial injuries alone to $26,000/-.

Coming to the neck injuries, details of which are specifically spelt out by the specialist in his report at page 7 of AB-1, the most serious of these is the fracture to the voice box which has permanently impaired the plaintiff as he cannot speak normally now. Added to this, is the presence of nasal intonation resulting from chronic nasal obstruction for which an operation was performed on January 21, 1980. However, this operation had left a depression of the nasal bridge as the lower half of his nose is pushed to one side and nasal airway is poor on both sides. This nasal deformity and nasal obstruction have been certified to be permanent. The impairment to the plaintiff's voice may well effect his chances of getting employment in the future when pitted against someone who speaks normally. This is so as he had always nursed an ambition to be a commercial pilot and to that end he has already earned himself a private pilot licence.

Although various cases were cited on awards, for the neck injuries, I found that I could not place much reliance on them as the injuries were quite unlike the ones suffered by the plaintiff. As such I have to lean on my experience gained through the short time that I have been adjudicating cases of this nature and I consider a global sum of $40,000/- to be reasonable under the circumstances, for the pain suffered caused by all the neck injuries put together.

Next I come to the fracture of the radius and ulna and for this I was referred to two cases: (1) Selwyn Alexsius Latiff (an infant), suing by his father and next friend *Latiff Stephen Aloysius* v. *Singapore Bus Service Limited & Anor.*[2] where $12,000/- was awarded for a compound fracture of the olecranon process of the right ulna for which suture and fixation of a tension band wire were necessary. This case was decided in 1977. The other case is *Chong Teen Thong* v. *Yap Chen Len & Anor.*[3], where $5,000/- was awarded for a fracture on the right radius and ulna. This case was decided in 1975. Of these two cases, I would rely more on the first one as it was decided nearer in point of time and moreover, the injuries suffered and treatment received by the plaintiff in that case are similar to the ones received by the plaintiff before me. However, bearing in mind the passage of time, I accordingly award $15,000/- to the plaintiff for the fracture of the radius and ulna.

As for the bruises to the knees and the right chin, I consider $500/- would be sufficient to cover the pain and suffering of these injuries. All in all then, the amount of general damages awarded to the plaintiff is $81,500/-.

I now come to the claim for loss of earnings. Loss of earnings, past and future, is an item of special damage which the plaintiff is entitled to claim provided that it is specifically pleaded. (See *Kemp & Kemp* Quantum of Damages Volume 1 page 124, *Ilkiw* v. *Samuels & Ors.*[4] and *Sum Wun Hoong* v. *Kader Ibramshan s/o Pichay*[5]). At page 4 of the Statement of Claim under the heading "PARTICULARS OF SPECIAL DAMAGES", the plaintiff has itemized and quantified the various special damages, the last being "Loss of earnings at $400/- per month for period October 1977 to February 1979 (17 months) ... $6,800/-". Apart from specifying his loss of earnings limited to 17 months, the plaintiff has clearly not pleaded loss of earnings after that period or future loss of earnings after trial or loss of earning capacity. Under the circumstances, the plaintiff cannot now claim through evidence loss of future earnings or loss of earning capacity for which he had never pleaded. If this is an oversight, he has only his Counsel to blame as no attempt was ever made before me to amend the Statement of Claim. Going one step further even if they were specifically pleaded, the evidence does not support the claim under these two heads of losses. The plaintiff had testified that it has always been his ambition to be a commercial pilot. For a start, he had applied for a position as Trainee Aircraft Maintenance Engineer with Malaysian Airline System (MAS) before the accident. Unfortunately, he was not successful and this fact alone bars the only right which the plaintiff may have to claim for loss of earnings as a commercial pilot. Had he been successful in securing the position he had sought for with MAS, the position would have been different. As to his alternative claim for loss of earning capacity, I need only refer to the case of *Moelicker* v. *A. Reyrolle & Co. Ltd.*[6], where the Court of Appeal laid down the following circumstances for which damages for loss of earning capacity can be claimed.

> "This head of damage generally arises when the plaintiff is at the time of trial in employment but there is a risk that he may lose his employment some time in the near future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally paid job".

As there was evidence to show that the plaintiff was not gainfully employed at the time of his trial, his claim for loss of earning capacity must also fail.

That leaves him with the loss of earnings which he had pleaded but limited to 17 months. At the time of the accident on July 30, 1977, the plaintiff was an Administrative Officer with Keang Nam Enterprise Limited. He was paid a salary of $400/- per month with the promise of further adjustments based on performance. The full terms of his employment appear at page 1 of AB-1. From the evidence it is clear that after the accident, he did not continue working for Keang Nam Enterprise Limited and no reason was given why he had left them. However, what is undisputed is that up to the time of trial, he was never employed anywhere else. In Court, he described himself as being a student. Counsel for the defendant concedes that a 6-month disability period would be fair and reasonable under the circumstances and to this, I am in complete agreement. To begin with, he was hospitalised for just over 3 months and giving him another 3 months to recuperate, he would, after the period of 6 months, be in a position to continue working where he was before the accident or seek gainful employment elsewhere for after all, he should do everything in his power to mitigate his own losses.

There is evidence that during the 3-month probationary period as an Administrative Officer, the plaintiff was entitled to $400/- per month and it was only after working for another 3 months after confirmation that he could have hoped to get a salary increase based on performance.

His letter of appointment is dated June 8, 1977 and assuming that he started working on July 1, 1977 he would have completed one month at the time of the accident and he would naturally have been paid for that one month. It is only from August 1, 1977 that his period of incapacity starts to run. If not for the accident he would have been confirmed by end of September 1977 and according to his testimony, from October until December 1977, depending on his performance, his salary would be increased to $450/-. The next increase of either $50/- or $100/- would take place in January 1978. Six months from August 1 1977 would stretch to February 1978 and for this period, I calculate plaintiff's earning losses assuming that he gave his best performance as follows

From August 1, 1977 to September 31, 1977 his loss would be at $400/- per month i.e. 2 x $400/- = $800/-.
From October 1, 1977 to December 31, 1977 his loss would be at $450/- per month i.e. 3 x $450/- = $1,350/-.
For February 1978 his loss would be at $550/-. Thus the total amount that the plaintiff is entitled to for loss of earnings during the 6-month incapacity period is $2,700/-.

On the whole then, there will be judgment to the plaintiff for the sum of $81,500/- general damages, interest at the rate of 6% per annum, from the date of service of writ to judgment, $5,810/- special damages ($2,700 + agreed $3,110/-) interest at 3% per annum, from date of accident to judgment and costs.

*Order accordingly.*

Solicitors: *Ranjit, Thomas & Kula; Syarikat Richard Ho.*

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## PUBLIC PROSECUTOR v. SERIDARAN

**[A.Cr.J. (Peh Swee Chin J.) November 3, 1983]**
**[Seremban – Criminal Appeal No. 48 of 1982]**

*Criminal Law & Procedure – Non-seizable case – Prosecution need not produce "order to police to investigate issued by Public Prosecutor" at trial – Criminal Procedure Code, ss. 108(ii) & 129(1).*

The issue before the present Court was, "in a prosecution of a non-seizable case conducted by the police before a court, where such non-seizable case has earlier been investigated by the police, is it incumbent on the prosecution to produce the order to the police to investigate issued by the Public Prosecutor?"

The learned Magistrate applied his mind solely to the failure to produce the said order, and upon such failure, he had relied for holding the trial before him to be a nullity and ordered an acquittal.

**Held:** (1) irrespective of whether such an order to investigate has in fact been obtained or not by the police under section 108(ii) of the Criminal Procedure Code, it is not incumbent for the prosecution to produce such an order at the trial, for failure to produce it in no way affects the jurisdiction of the court to hear the case unlike section 129(1) of the Criminal Procedure Code, eg. where it is expressly provided that the court shall not take cognisance of certain specified offences except with the previous sanction of the Public Prosecutor;

(2) even assuming the trial to be a nullity, the learned magistrate should have discharged the defendant, with such discharge not amounting to an acquittal. The order of acquittal would therefore be set aside and a re-trial be ordered.

*Cases referred to:*
(1) *Kuruma* v. *The Queen* [1955] 1 All E.R. 236.